Konsortium Abass Sdn Bhd v Syarikat Bekalan Air Selangor Sdn Bhd (Kerajaan Negeri Selangor, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-543 OF 2011
LEE SWEE SENG JC
10 SEPTEMBER 2012

Civil Procedure — Action — Cause of action — Plaintiff sued defendant for failure to pay for supply of treated water — Defendant sought indemnity and contribution against state government — Whether defendant had cause of action to cite state government as third party — Whether defendant's claim against third party and latter's defence identical to pleadings by both parties in unresolved separate suit — Whether multiplicity of proceedings abused process of court

Under an agreement ('novation agreement') between the plaintiff ('Abass'), the defendant ('Syabas') and the Selangor State Government ('third party'), Syabas was to pay Abass monthly for the purchase of water treated by Abass for distribution throughout the state. Syabas fell into arrears of payment and Abass filed the instant action to recover the same. Syabas in turn sought indemnity and contribution from the third party premising its cause of action on cl 5.01 of the novation agreement and the third party's refusal to agree to raise the prevailing gazetted water tariff. Clause 5.01 provided that if Syabas defaulted in its monthly payments to Abass the third party could terminate its concession agreement ('CA') with Syabas. But if it elected not to terminate the CA then the third party would have to take over Syabas' obligations to pay Abass. With regard to the gazetted tariff, Syabas' argument was that if the tariff was raised, or if Syabas was paid compensation under the CA, it would be in a position to settle Abass' dues. In that connection, Syabas had already filed an action against the third party ('the Syabas Main Suit') to compel the latter to raise the tariff or pay it compensation. That suit had yet to be determined. The third party in the instant suit applied to set aside the third party notice and strike out Syabas' claim against it for abuse of process arguing that under the CA the third party could not terminate the CA without the federal government's consent and that although such consent had been applied for, it was refused. As such, it said cl 5.01 could not be invoked as the condition precedent of obtaining the federal government's consent to the termination could not be fulfilled. The third party also said Syabas could not justify its failure to settle Abass' dues by blaming it on the third party's failure to agree to increase the tariff.

Held, setting aside the third party notice and striking out Syabas' claim against the third party with costs:

(1) The third party had elected to terminate the CA and had written to the

federal government for its consent to do so but the request was turned down. So long as the condition of the third party electing not to terminate the CA had not been fulfilled, Syabas could not enforce the contingent contract in cl 5.01 by asking the third party to take over its liability to Abass (see para 21).

(2) Syabas could not by pleading that the third party had not terminated the CA invoke the consequence of cl 5.01 of the novation agreement which could only be invoked if the third party had 'elected not to terminate'. No cause of action had arisen. Syabas could not say the third party had 'elected not to terminate' the CA; hence cl 5.01 could not come into operation and hence there was no right to a claim for indemnity or contribution (see paras 30–31).

(3) Syabas' claim against the third party was a component of its claim in the Syabas main suit. Similarly, the third party's defence in the third party proceedings was the same as its defence in the Syabas main suit. This resulted in a multiplicity of proceedings where the claims, issues and reliefs sought for were the same. This was totally undesirable, a waste of judicial time and an abuse of process of the court (see paras 36 & 39).

[Bahasa Malaysia summary

Di bawah perjanjian ('perjanjian novasi') di antara plaintif ('Abass'), defendan ('Syabas') dan Kerajaan Negeri Selangor ('pihak ketiga'), Syabas dikehendakki membayar Abass secara bulanan untuk pembelian air yang dirawat oleh Abass untuk pengagihan di seluruh negeri tersebut. Syabas tertunggak bayaran dan Abass memfailkan tindakan ini untuk mendapatkan kembali bayaran tersebut. Syabas sebaliknya memohon indemniti dan sumbangan daripada pihak ketiga dengan mengasaskan kausa tindakannya atas klausa 5.01 perjanjian novasi dan penolakan pihak ketiga untuk bersetuju menaikkan tarif air semasa yang diwartakan. Klausa 5.01 memperuntukkan bahawa jika Syabas mengingkari bayaran bulanannya kepada Abass, pihak ketiga boleh menamatkan perjanjian konsesinya ('PK') dengan Syabas. Tetapi jika ia memilih untuk tidak menamatkan PK dengan itu pihak ketiga akan mengambil alih tanggungjawab Syabas untuk membayar Abass. Berkenaan tarif yang diwartakan, hujahan Syabas adalah bahawa jika tarif tersebut dinaikkan, atau jika Syabas dibayar pampasan di bawah PK, ia akan berada dalam kedudukan untuk menyelesaikan apa yang belum dibayar kepada Abass. Dalam hubungan ini, Syabas telah memfailkan tindakan terhadap pihak ketiga ('Tindakan Utama Syabas') untuk memaksa pihak ketiga menaikkan tarif atau membayar pampasan. Tindakan tersebut belum lagi ditentukan. Pihak ketiga dalam tindakan ini memohon untuk mengenepikan notis pihak ketiga dan membatalkan tuntutan Syabas terhadapnya untuk penyalahgunaan proses dengan berhujah bahawa di bawah PK pihak ketiga tidak boleh menamatkan PK tersebut tanpa izin kerajaan pusat dan bahawa walaupun izin sedemikian telah dipohon, ia ditolak. Oleh itu, ia menyatakan klausa 5.01 tidak boleh

dibangkitkan sebagai syarat duluan untuk memperolehi izin kerajaan pusat untuk penamatan tidak boleh dipenuhi. Pihak ketiga juga menyatakan Syabas tidak dapat menjustifikasikan kegagalannya untuk menyelesaikan hutangnya dengan Abass dengan menyalahkannya atas kegagalan pihak ketiga untuk bersetuju menaikkan tarif tersebut.

Diputuskan, mengenepikan notis pihak ketiga dan membatalkan tuntutan Syabas terhadap pihak ketiga dengan kos:

(1) Pihak ketiga memilih untuk menamatkan PK dan menulis kepada kerajaan pusat untuk izinnya berbuat demikian tetapi permintaan tersebut ditolak. Asalkan syarat pihak ketiga memilih untuk tidak menamatkan PK tidak dipenuhi, Syabas tidak dapat menguatkuasakan kontrak kontijen dalam klausa 5.01 dengan meminta pihak ketiga mengambil alih liabilitinya terhadap Abass (lihat perenggan 21).

(2) Syabas tidak dapat dengan pliding bahawa pihak ketiga tidak menamatkan PK membangkitkan akibat klausa cl 5.01 perjanjian novasi yang mana boleh dibangkitkan jika pihak ketiga telah 'elected not to terminate'. Tiada kausa tindakan berbangkit. Syabas tidak dapat menyatakan yang pihak ketiga telah 'elected not to terminate' PK tersebut; maka klausa 5.01 tidak terpakai dan oleh itu tidak terdapat hak untuk menuntut indemniti atau sumbangan (lihat perenggan 30–31).

(3) Tuntutan Syabas terhadap pihak ketiga adalah komponen tuntutannya di dalam tindakan utama Syabas. Sama juga, pembelaan pihak ketiga di dalam prosiding pihak ketiga adalah sama sebagai pembelaannya di dalam tindakan utama Syabas. Ini menyebabkan kepelbagaian prosiding di mana tuntutan, isu-isu dan relief yang dipohon adalah sama. Ini benar-benar tidak diingini, pembaziran masa mahkamah dan penyalahgunaan proses mahkamah (lihat perenggan 36 & 39).]

Notes

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 55–77.

Cases referred to

Aberfoyle Plantations v Khaw Bian Cheng [1960] 1 MLJ 47, PC (refd)

Bandar Builder Sdn Bhd & ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama [1979] 1 All ER 657, CA (refd)

Dato' Raja Azwane bin Raja Ariff v Dato' Man bin Mat & Ors [2011] 9 MLJ 467, HC (refd)

Edison & Swan United Electric Light Co v Holland (1889) 33 Ch D 492, CA (refd)

Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Cantre Sdn Bhd & Anor, third party and another appeal) [2008] 4 MLJ 839; [2008] 6 CLJ 31, CA (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)
Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290; [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61, SC (refd)
Lee Kuan Yew v Dewan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties) [1993] 1 SLR 727, HC (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd [1984] 2 MLJ 105; [1984] 1 CLJ (Rep) 211, FC (refd)
Maria Tunku Sabri v Datuk Wan Johari bin Wan Hussin [2012] 7 MLJ 419; [2011] 8 CLJ 859, HC (refd)
Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661; [2010] 3 CLJ 924, CA (refd)
National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] CLJ 282, FC (refd)
Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686; [2009] 1 CLJ 169, CA (refd)
Tan Lay Soon v Kam Mah Theatres Sdn Bhd (Malayan United Finance Bhd, Intervener) [1992] 2 MLJ 434; [1992] 3 CLJ 657 (Rep), HC (refd)
Tan Poey Kheng v Ma Peng Kiat [1984] 1 MLJ 58 (refd)

Legislation referred to

Contracts Act 1950 s 33(a), (b)
Rules of the High Court 1980 O 16 rr 2(1), 4(5), 6, O 18 r 19, 19(1)(a), (b), (c), (d), O 28 r 4(1), O 32, O 32 r 6, 6(3), O 53 r 3(3), O 73 r 8(1)

Fahda Nur (Ain Farhana Mohd Hamid with her) (Fahda Nur & Yusmadi) for the applicant/third party.
Harpal Singh Grewal (Fadzilah Pilus, AS Lua and Daphne Khiew with him) (Soo Thien Ming & Nashrah) for the respondent/defendant.

Lee Swee Seng JC:

PROLOGUE

[1] Water, water everywhere … but before it is safe to drink it has to be treated. This task has been undertaken by water treatment plant concessionaires like the plaintiff, Konsortium Abass Sdn Bhd ('Abass') for Selangor under a Privatisation Cum Concession Agreement ('PCCA') dated 9 December 2000 between the Selangor State Government and Abass. The

A arrangement where Abass sells and supplies treated water to the defendant, Syarikat Bekalan Air Selangor Sdn Bhd ('Syabas') for distribution and supply throughout Selangor is contained in a novation agreement dated 15 February 2005 between Abass, Syabas and the Selangor State Government.

B

[2] Under the novation agreement, Syabas took over the obligations of the Selangor State Government in respect of the purchase of treated water from Abass. With that Syabas shall pay Abass for the treated water based on the bulk supply charge ('BSC') on a monthly basis. Such payments were to be in C accordance with the terms of the PCCA between the Selangor State Government and Abass wherein Abass was awarded the concession to operate and maintain certain water facilities in Selangor.

PROBLEM

D

[3] Abass' problem is plain; it had not been paid by Syabas for quite a while. It did what it had to do which is to sue Syabas for the failure to make full payments of the outstanding invoices for the sale of the treated water. Syabas E stand is simple; if it has to pay then the Selangor State Government is to pay under an indemnity and full contribution on Abass' claim of RM149,478,553.02 together with interests and costs. Apparently this right of indemnity and contribution is contained in section 5.01 of the novation agreement.

F

[4] Syabas applied to the court and obtained an order on 3 November 2011 to bring third party proceedings against the Selangor State Government for, inter alia, a declaration that the third party is responsible to make full payment of all invoices issued by Abass and an indemnity and contribution on Abass' G claims against Syabas. Syabas then issued the third party notice dated 4 November 2011 and served its statement of claim dated 14 December 2011 on the third party pursuant to the directions on the third party proceedings. Syabas' claim against the Selangor State Government is for, inter alia, declaration, judgment and indemnity premised upon the following:

H

(a) the Selangor State Government's alleged failure to terminate Syabas' concession of 15 December 2004; and

(b) the Selangor State Government's refusal to agree to an adjustment of the I prevailing *gazette* tariff.

[5] The Selangor State Government as the third party entered appearance and filed and served its defence on 4 January 2012. Learned counsel for the third party, Miss Fahda Nur, castigated Syabas' claim as misconceived and

obviously unsustainable and summarised the defence of the third party as follows:

(a) section 5.01 relied on by Syabas is contingent on the fact that the Selangor Government must 'elect not to exercise its right to terminate';

(b) however, cl 28.1–28.2 of the concession agreement does not confer on the Selangor State Government the right to terminate or election to terminate. It can only issue a notice of default or terminate, *'with the consent and agreement of the Federal Government'*;

(c) todate, there has been no amendment to the concession agreement and the mandatory requirement of the federal government's consent for the issuance of the notice of default or termination. As there is no unilateral right to terminate, and consent is not forthcoming, there would therefore be no right to elect to terminate or otherwise;

(d) it follows that the said clause is dependent upon a prior, condition which has not been fulfilled and therefore it cannot be enforced;

(e) in any event, the Selangor Government has attempted to request consent of the federal government to terminate the concession agreement and this request has been turned down;

(f) Syabas' inability to make payment to Abass cannot be justified on the basis of the non-adjustment of the prevailing *gazetted* tariff. In any event, payment due to Abass shall apply irrespective of whether a new agreed tariff is determined or not; and

(g) Syabas must meet mandatory requirements of the concession agreement in order to support its claim for compensation. Syabas cannot therefore justify non-payment by blaming it on the Selangor State Government for not agreeing to a new (increased) tariff.

PRAYERS

[6] The Selangor State Government applied in encl 77 to set aside the third party notice under O 16 r 6 of the Rules of the High Court 1980 (RHC) as well as to strike out the statement of claim of Syabas against it under O 18 r 19(1)(a), (b), (c) and (d) Rules of the High Court 1980 ('RHC') and/or under the inherent powers of the court.

[7] The grounds relied on by the third party in making the application are, inter alia, as follows:

(a) that section 5.01 of the novation agreement which forms the basis of the defendant's claim is a contingent contract;

(b) that the third party is unable to terminate the concession agreement with Syabas as the consent of the federal government to so terminate has not been forthcoming; and

(c) that the claim against the third party is an abuse of process.

PRELIMINARY POINT

[8] Learned counsel for the defendant, Mr Harpal Singh, had raised a preliminary point for this court's decision in that the third party by applying to set aside the third party notice was in effect inviting the court to revisit its decision to issue the third party notice. Such an application it was submitted by Mr Harpal was misconceived and an abuse of the process of the court.

[9] It transpired that on 22 July 2011 the defendant had served on the third party the application in encl 13 being the defendant's summons for leave to issue the third party notice as required under O 73 r 8(1) of the RHC which provides as follows:

> Notwithstanding anything in Order 16, a third party notice (including a notice issuable by virtue of Order 16 rule 9) for service on the Government shall not be issued without the leave of the Court, and the application for the grant of such leave must be made by summons, and the summons must be served on the plaintiff and the Government.

[10] The third party did not appear on the hearing of the summons for leave, and neither did it support the appeal of the plaintiff against the registrar's decision dated 3 January 2011 for the third party notice to be issued. The third party had however attended the hearing for the third party directions and on 4 January 2012 entered defence on the defendant's claim. Consequently, Mr Harpal submitted that based on the authorities of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104 and that of *Tan Lay Soon v Kam Mah Theatres Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434; [1992] 3 CLJ 657 (Rep), the application by the third party in encl 77 to set aside the third party notice is res judicata and that the third party is estopped from reopening and re-litigating the issue.

[11] With the greatest of respect, I do not think so. Order 16 r 4(5) of the RHC provides that 'Any order made or direction given under this rule shall be in Form 23 and may be varied or rescinded by the court at any time.' Order 16 r 6 of the RHC further provides that 'Proceedings on a third party notice may, *at any stage of the proceedings, be set aside by the Court*.' (Emphasis added.). The third party was not before the court when the matter came before the registrar

for the ex-parte hearing of the application for the issuance of a third party notice under O 16 r 2(1) of the RHC. What is necessary for the court to decide at leave stage is merely that prima facie (based on the unrebutted evidence of the defendant) there is a case made out for the issuance of a third party notice. It is not unlike an ex-parte application for leave for judicial review under O 53 r 3(3) of the RHC where notice of such leave application must be given to the Attorney General's Chambers not later than three days before the hearing of the leave application. The fact that the Attorney General's Chambers did not appear at leave stage does not prevent them from arguing on the full merits of the judicial review application as the test for leave is merely that of a prima facie test.

[12] Likewise in the leave application for a third party notice to be isssued, the third party may at any stage of the proceedings, apply to set aside the third party notice as expressly provided under O 16 r 6 of the RHC and more so when it has not been heard. In *Edison & Swan United Electric Light Co v Holland* (1889) 33 Ch D 492, it was held that on the application for leave the court will not go into any question as to the merits of the action or the validity of the claim for indemnity. As the merits have not been considered fully, surely res judicata cannot apply. The Court of Appeal in *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd* [2008] 4 MLJ 839; [2008] 6 CLJ 31 held that for res judicata to apply the decision of the court must necessarily and with precision determine the point in issue. In *Dato' Raja Azwane bin Raja Ariff v Dato' Man bin Mat & Ors* [2011] 9 MLJ 467, I had expressed the matter in this wise before res judicata can be said to apply in that 'the point raised must have been decided with sufficient precision, particularity and peculiarity and not just by a superficial and peripheral passing remark of a general nature'. Surely one does not come close to that in what is essentially an ex-parte application for leave to issue a third party notice though notice of it had been served on the third party and when the third party had not been heard. The issue has not been finally determined as the merits have been delved into and deliberated let alone decisively and finally determined in the leave application stage. The third party cannot be shut out under the principle of res judicata when under O 16 r 6 of the RHC the third party has a right to apply to set aside the third party proceedings.

[13] Even under the general provision of O 32 with respect to 'Applications and Proceedings in Chambers', O 32 r 6 of the RHC provides that:

> The Court may set aside an order made ex parte.

[14] Order 32 r 6(3) of the RHC further provides that:

A Where the Court hearing an application proceeded in the absence of a party, then, whether or not an order made on the hearing has been perfected, the Court, if satisfied that it is just to do so, may re-hear the application.

B **[15]** If authority is needed one may refer to the case of *Tan Poey Kheng v Ma Peng Kiat* [1984] 1 MLJ 58 where Mohamed Dzaiddin J (as he was then) held that O 32 r 6 of the RHC provides that the court may set aside an order made ex parte and that this rule embodies the fundamental rule of practice that a party affected by an ex parte order may apply to court to discharge it, in as much as he has not had an opportunity of being heard.

C

[16] This principle is further reiterated in the Court of Appeal case of *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661; [2010] 3 CLJ 924 where His Lordship Abdul Malik Ishak JCA held at p 935:

D

> Order 32 r 6 of the RHC states that the court may set aside an order made ex-parte. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v Sacker* (1888) 39 Ch D 249, at p 251; *Becker v*
>
> E *Noel And Another, Practice Note* [1971] 1 WLR 803 (CA); and *Tan Poey Kheng v Ma Peng Kiat* [1983] 1 LNS 56 HC). It is trite law that a judge does not become functus officio after issuing an ex parte order. In an originating summons procedure under O 28 r 4(1) of the RHC, an ex-parte order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. According to cases like *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 3 CLJ 466; and *Datuk M Kayveas v PV Das*
>
> F [1997] 4 CLJ 544 (CA), an application to set aside an ex-parte order is not an appeal and a court of co-ordinate jurisdiction may exercise the power to vary or revoke it.

[17] Learned counsel Mr Harpal for the defendant has not been able to
G produce an authority on point and based on the reasons given above, I had dismissed the preliminary point.

PRINCIPLES

H **[18]** The defendant's central allegation in support of its purported cause of action against the third party is premised upon s 5.01 of the novation agreement which reads:

> Notwithstanding the provisions herein and the SYABAS Concession Agreement, in
>
> I the event of any breach by SYABAS of the payment of the Monthly Payments based on the Bulk Supply Rate to Abass, the parties hereto agree and acknowledge such a default shall be deemed a breach referred to under Clause 28.1 of the SYABAS Concession Agreement wherein the State Government shall have the right to terminate the SYABAS Concession Agreement. *In the event that the State Government elects not to exercise its right to terminate the SYABAS Concession*

> *Agreement*, the State Government shall take over SYABAS' obligation to make payment of the Monthly, Payments based on the Bulk Supply Rate to ABASS … (Emphasis added.)

Whether cl 5.01 of the novation agreement is a contingent contract?

[19] Miss Fahda Nur on behalf of the Selangor State Government submitted that the above section 5.01 of the novation agreement is in the nature of a contingent contract within the meaning of s 33(a) of the Contracts Act 1950 which reads:

> Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

[20] The enforcement of this right of Syabas to seek an indemnity from the Selangor State Government would only arise if and only if the Selangor State Government has exercised its right not to terminate the concession agreement with Syabas. However the situation at hand is the very opposite of what Syabas wanted. The Selangor State Government has not elected not to terminate the concession agreement. On the contrary it has exercised its right to terminate the concession agreement though without success. It cannot terminate the concession agreement unilaterally. Under cl 28.1–28.2 of the concession agreement it can only issue a notice of default or terminate 'with the consent and agreement of the federal government'. The consent of the federal government must first be obtained and such a consent has not been forthcoming.

[21] Indeed the Selangor State Government had elected to terminate the concession agreement and had written to the federal government for its consent to do so but that had been turned down by the federal government. See letters of the Selangor State Government to the federal government dated 19 December 2008 (exh AKI1) and 18 February 2009 (exhAKI3) and the federal government's reply of 4 February 2009 (exh AKI2) which confirms that such a consent is not forthcoming. For so long as the condition of the Selangor State Government electing not to terminate the concession agreement has not been fulfilled, Syabas cannot enforce the contingent contract by aisking the Selangor State Government to take over its liability to Abass as the contingent condition has not been fulfilled.

[22] Taking the argument a step further, can the third party here, the Selangor State Government, be said to have elected not to terminate the concession agreement when it had at all times elected to terminate it but could not do so effectively without the federal government's consent? In other words can an election not to terminate the concession agreement take place by default

in that if the Selangor State Government cannot elect to effectively terminate the concession agreement, by default it is said to have elected not to terminate the concession agreement and hence it has now to take over the liabilities of Syabas to Abass? I do not think so for to allow that interpretation would be to ignore completely the plain and particular meaning of the word 'elect'. By no stretch of the imagination can one be said to have elected not to terminate an agreement when all along one has tried to terminate it but could not do so because another condition has not been fulfilled for its termination which is the federal government's consent in this case.

[23] To elect is a positive act of the will consciously choosing between two or more alternative courses of action. It cannot be passively attributed to a person especially when the person has elected to do just the very opposite. The *Concise Oxford English Dictionary*, (11th Ed), Revised, (2008), Oxford University Press at p 460 defines the verb 'elect' as follows:

1. choose (someone) to hold a position, especially public office, by voting.
2. *opt for or choose* to do something. (Emphasis added.)

[24] To elect is to decide to choose and not by default, to have the choice hoisted on oneself. Here the Selangor State Government did elect to terminate and did not choose to 'elect not to terminate' the concession agreement as stated in para 13 of the affidavit of Tan Sri Dato' Seri Abd Khalid Ibrahim affirmed on 25 January 2012 as follows: '… the Selangor Government has repeatedly attempted to terminate the Concession Agreement but failed to do so due to the refusal of the Federal Government.' See also paras 14–15 of the said affidavit.

[25] In fact the word 'elect' received elucidation in the legal context in *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama* [1979] 1 All ER 657 and it is often in such a context that the meaning of a particular word is extensively explored as set out below:

> The classic definition of an election is to be found in a well known passage in the speech of Lord Blackburn in *Scarf v Jardine* (1882) 7 App Cas 345, 360–361;
>
> > The principle, I take it, running through all the cases as to what is an election is this, that *where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; whether he intended it or not, if he has done ah unequivocal act* — I mean an act which would not justifiable if he had elected the other way — the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election

The editors of *Spencer Bower* put it as follows in art 305 under the heading 'Election must be unequivocal'.

> An election cannot rest upon equivocal words or conduct; it must amount *to a clear demonstration of a choice between two alternatives, one being chosen to the necessary exclusion of the other*. There are many decisions in which a submission of election has failed, simply on the ground that the words or conduct proved did not amount to a sufficiently clear and unequivocal intimation of a choice finally made. (Emphasis added.)

[26] Clearly to 'elect not to terminate' would necessarily mean (i) able to choose between terminating and not terminating and (ii) consciously and positively choosing not to terminate in the light of the two alternatives available. From the undisputed and undisputable facts, the Selangor State Government has not elected not to exercise its right to terminate the concession agreement. The opposite is true, it has elected to exercise its right to terminate the concession agreement though it cannot do so effectively without the federal government consent.

[27] This is not to pre-empt the fact that at some point in the future, it may well be able to persuade the federal government to grant its consent to the termination of the concession agreement. Conversely it may be persuaded to elect not to terminate the concession agreement but until and unless the latter event takes place, the contractual obligation to take over the liabilities of Syabas remains contingent and unenforceable by Syabas against the Selangor State Government. The position and effect of a contingent condition is that until and unless it is fulfilled, the contractual clause shall not take effect as was clearly clarified in the case of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ 282 with respect to the sale of a property subject to a deposit being paid and the approval of the Foreign Investment Committee ('FIC'). The Federal Court held that an agreement for sale of immovable property subject to the approval of Foreign Investment Committee (FIC) is a contract of sale contingent upon the approval of the transaction by the FIC:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, no guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is however, a condition which is known in the law of contract as a *contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled*. Until the FIC approval was given liability for further performance remained unenforceable, ie suspended though neither the respondents nor the appellants could resile from it

A until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33(a) of the Contracts Act which enacts:

> 33. (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened …

B The effect of non-approval was to render the agreement void. Further performance of the agreement was understood between the parties to be dependent or contingent upon the approval of the FIC. *The effect of such a contingent condition and as laid down by s 33(a) of the Contracts Act, a contract does not take effect unless and until the condition is fulfilled* and if it becomes impossible of performance, the agreement becomes void in accordance with s 33(b) of the Contracts Act. (Emphasis added.)

C

[28] See also the case of *Aberfoyle Plantations v Khaw Bian Cheng* [1960] 1 MLJ 47 and also the case of *Maria Tunku Sabri v Datuk Wan Johari bin Wan Hussin* [2012] 7 MLJ 419; [2011] 8 CLJ 859.

D

[29] The defendant Syabas in para 18 of its statement of claim has stated that it is bringing its claim on the basis that 'to date the third party has not terminated the concession agreement on the ground that the defendant is in breach of its obligations to the plaintiff'. The defendant cannot by such a plea E invoke the consequence of section 5.01 of the novation agreement which can only be invoked if the Selangor State Government has 'elected not to terminate'.

[30] If the parties had wanted the consequences of non-termination to apply F irrespective of whether it is an election not to terminate the concession agreement or the result of an ineffective termination by the Selangor State Government because the federal government consent is not forthcoming, it could have used the expression 'In the even that the Syabas Concession Agreement is not terminated for any reason whatsoever, … ' Indeed such an G expression was used with respect to termination and the consequences are clearly spelt out as set out in s 6.01 of the novation agreement:

> In the event that the Syabas Concession Agreement is terminated for any reason whatsoever, this Novation Agreement shall forthwith terminate and the parties hereto shall be entitled to avail themselves to the provisions of the SYABAS H Concession Agreement or the PCCA, as the case may be, as though this Novation Agreement has ceased to have effect from the date of such termination and ABASS shall thereafter be entitled to deal with the State Government in respect of all matters under the PCCA. *Such termination shall not affect the parties' rights and liabilities against each other which have accrued before the said termination and it shall not release* I *any of the parties from any liability which at the time of the termination has already accrued to the other party or which thereafter may accrue in respect of any act or omission prior to such termination*. (Emphasis added.)

[31] Consequently no cause of action can be said to have arisen even if

assuming that judgment has been entered by Abass (the plaintiff) against Syabas (the defendant) as Syabas cannot say that the Selangor State Government (the third party) has elected not to terminate the concession agreement and hence section 5.01 of the novation agreement cannot come into operation and hence there is no right to a claim for indemnity or contribution.

Multiplicity of proceedings

[32] Syabas has in its statement of claim made clear its reasons for its failure to pay Abass and the basis of its claim for indemnity as explained in paras 15, 15.1–15.6 of its statement of claim. Paragraph 15 reads:

> The defendant was and still is unable to discharge its payment obligations to the plaintiff and the other water treatment operators (ie. Puncak Niaga and SPLASH) due to financial difficulties caused by the refusal of the third party to pay compensation to the defendant under the Concession Agreement. This is elaborated below.

[33] Syabas has put the blame squarely on the Selangor State Government for its purported failure to agree to an adjustment of the prevailing *gazetted* tariff. However that claim is the subject matter of another suit in Civil Suit No 22NCC-1478–09 of 2011 (Syabas main suit). In that Syabas main suit, Syabas is the plaintiff and the Selangor State Government the defendant and indeed subsequently the federal government has been brought in as the third party.

[34] I agree with learned counsel for the Selangor State Government Miss Fahda Nur that paras 15.1–15.6 of Syabas' statement of claim is a 'summarised version' of the Syabas main suit. Paragraphs 15.1–15.6 bear striking resemblance to paras 14,17,19 and 21–22 of Syabas' main suit in the statement of claim. In short Syabas is saying that should it succeed in the Syabas main suit to compel the Selangor State Government to increase its tariff or to pay it compensation as the case may be, it would then be in a position to pay Abass. In reality and undeniably Syabas third party claim against the Selangor State Government is a component of the claim by Syabas against the Selangor State Government in the Syabas main suit. The defence of the Selangor State Government in this third party proceeding is the same as its defence in Syabas main suit which would include the review of documents, audit report and whether Syabas' claim for tariff adjustment and/or compensation (in lieu thereof) has met the mandatory requirements of the concession agreement.

[35] That would certainly cause a multiplicity of proceedings in that there are two suits, the third party proceedings in this suit and Syabas main suit proceedings which claims, issues and reliefs are essentially one and the same. I did raise this pertinent point with Mr Harpal Singh, learned counsel for Syabas

as to whether it would be channelling payments to Abass should it succeed in its main suit against the Selangor State Government and obtain the adjustment upward in the tariff rates and the compensation from the Selangor State Government. His candid answer was that Syabas is entitled to keep what it might obtain for itself in the main suit and that further this third party claim by Syabas against the Selangor State Government can still proceed independently! I think the clear answer is that to allow the two suits to continue that is the Syabas main suit and the current third party proceedings would be to encourage multiplicity of proceedings with the danger of two courts arriving at two different decisions and even if it is the same decision, there is the danger of a double claim in that the Selangor State Government if required to so pay Syabas in the Syabas main suit would still have to pay Syabas under the third party proceedings. The absurdity of the result would constrain one to conclude that it is totally undesirable and a waste of judicial time to have essentially two proceedings on the same issue which is to determine the liability of the Selangor State Government to Syabas.

[36] A plain reading of para 16 of Syabas' statement of claim against the Selangor State Government would lead one to the invariable conclusion that Syabas is defending this suit based on the Syabas main suit and at the same time bringing third party proceedings against the Selangor State Government based on the Syabas main suit. Paragraph 16 reads:

> The defendant has a good defence to the plaintiffs claim herein. The defendant repeats paragraphs 15, 15.1 to 15.6 above. The defendant states that it has been making proportionate payments to the plaintiff pursuant to Section 4.04(a) of the Novation Agreement.

[37] I cannot do better than to echo the words of His Lordship Gunn Chit Tuan SCJ (as he then was) who, in delivering the decision of the Supreme Court in *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 at p 295; [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 at p 70, had observed that the filing of a petition by a petitioner who had also filed a writ of summons and statement of claim amounted to multiplicity of actions:

> Although the issues raised and the relief sought are not totally similar yet we consider that the substantial duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out as the learned judge has done and not stayed or the petition be allowed to be amended as suggested by counsel for the petitioner.

[38] I agree with learned counsel Miss Fahda Nur that the latin maxim *nemo debet bis vexari* (that no one ought to be twice troubled or harassed for the one

and the same cause) must apply here.

Abuse of court process

[39] A multiplicity of proceedings amounts to an abuse of court process. This is exemplified in the Court of Appeal in the case of *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686 at p 694; [2009] 1 CLJ 169 at p 180 where His Lordship Low Hop Bing JCA observed:

> … The factual background to the appeals provides a plain and obvious case for multiplicity of actions. The existence of the plaintiff's writ action and the plaintiff's originating summons touching on an identical issue ran counter to the bona fide doctrine. It militated against public policy and the interests of justice. The multiplicity of actions was an abuse of process of the court that came within the purview of O 18 r 19(1)(d) of the RHC and must be treated as such.

[40] Further, at p 187, His Lordship Abdul Malik Ishak JCA held:

> Taken objectively, this is a case about an abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people in society.

[41] A third party proceeding is akin to a fresh action by the defendant against the third party. In *Lee Kuan Yew v Dewan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties)* [1993] 1 SLR 727 at p 728, the Singapore High Court held, inter alia, that:

> (i) the third party procedure is analogous to a cause instituted by the defendant as the plaintiff against the third party as the defendant with the consequence that the third party may defend himself in any way in which any defendant in an action at the suit of a plaintiff may defend himself and (ii) the principles applicable to set aside a third party notice are the same as those governing the determination of an application to strike out a plaintiff's claim under O 18 r 19 of the Rules of Court (Singapore) or inherent jurisdiction of the court. Based on the above principles reference may now be made to the corresponding O 18 r 19 of the Rules of the High Court 1980 …

[42] This court is mindful of the principles enunciated in *Bandar Builder Sdn Bhd v UMBC* [1993] 3 MLJ 36 (SC) and in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 2 MLJ 105; [1984] 1 CLJ (Rep) 211(FC) that the procedure under O 18 r 19 of the RHC is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim, as

it stands is insufficient, even if proved, to entitle the plaintiff to the relief which is sought and the fact that even if the plaintiff's case be weak, that is no justification for striking it out.

[43] However where the nub of the defendant's claim against the third party hinges on the interpretation of section 5.01 of the novation agreement which interpretation can be undertaken at this stage and indeed has been undertaken by the court at this stage, there is no necessity to proceed to trial. No further relevant evidence would be necessary or helpful with respect to such an interpretation where the words employed are clear. Added to that is the inevitable multiplicity of proceedings where in the Syabas main suit, Syabas has claimed against the Selangor State Government for substantially the same reliefs as in this third party proceedings; that of increase in the tariffs rates which if judgment is given in its favour, it would then be in a position to pay Abass.

PRONOUNCEMENT

[44] In the circumstance and for all the reasons given above, I was constrained to set aside the third party notice and to strike out the defendant's statement of claim dated 14 December 2011 against the third party. I also ordered costs of RM10,000 to be paid by the defendant to the third party.

Third party notice set aside and Syabas' claim against third party struck out with costs.

Reported by Ashok Kumar